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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellees*

**Appeal from the United States District Court for the District of Massachusetts**

## JURISDICTIONAL STATEMENT

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No.

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PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellees*

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**Appeal from the United States District Court for the District of Massachusetts**

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## JURISDICTIONAL STATEMENT

In accordance with Rule 15 of the Revised Rules of the Supreme Court of the United States, Pan-Atlantic Steamship Corporation, intervening defendant in the Court below, presents this its statement as to jurisdiction, and in support thereof respectfully states:

## OPINIONS BELOW

(a) The opinion of the United States District Court for the District of Massachusetts in this case is reprinted herein as Appendix "A".

The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, which was held by the Court below to rule in principle the decision in this case, is reprinted herein as Appendix "B".

The order of the Interstate Commerce Commission, which was the subject matter of the suit in the lower court is reprinted herein as Appendix "C".

## JURISDICTION

(b) (i) The appellees, Atlantic Coast Line Railroad Company, et al, instituted suit against the United States of America before the United States District Court on March 9, 1956, under the provisions of Sections 1336 and 2321 through 2325 of the Judicial Code (28 U. S. C. 1336, and 2321 through 2325) and Sections 17(9), 311(a) and 316(a) of the Interstate Commerce Act (49 U. S. C. 17(9), 911(a) and 916(a)).

The Interstate Commerce Commission and Pan-Atlantic Steamship Corporation moved for leave to intervene as parties defendant pursuant to Section 2323 of the Judicial Code (29 U. S. C. 2323), which motions were granted by the District Court.

This appeal seeks review of the action of the District Court in vacating, annulling, and setting aside the order of the Interstate Commerce Commission dated October 28, 1955, entered in Interstate Commerce Commission Docket No. W-376 (Sub Nos. 11 and 12). The said order of the Commission extended the temporary au-

thority of Pan-Atlantic Steamship Corporation to engage in inter-coastal operations beyond the initial period of 180 days, for which such temporary authority was originally granted, until the final determination by the Commission of the pending application of Pan-Atlantic Steamship Corporation for a permanent certificate of public convenience and necessity covering that operation.

(ii) The judgment appealed from was entered by the District Court on May 25, 1956, and is reproduced herein as Appendix "D". Notice of Appeal to this Court was filed on July 24, 1956, with the Clerk of the United States District Court for the District of Massachusetts.

(iii) The jurisdiction of this court is invoked under the provisions of Section 1253 of the Judicial Code (28 U. S. C. 1253).

(iv) The jurisdiction of this Court is believed to be sustained by a number of decisions of this court, including:

*American Trucking Assoc. Inc.* v. *U. S.*, 344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337
*Riss and Co.* v. *U. S.*, 341 U. S. 907, 71 S. Ct. 617, 95 L. Ed. 1345
*Alton R. Co.* v. *U. S.*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586
*U. S* v. *Maher*, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162

## STATUTES INVOLVED

The essential issues decided by the Interstate Commerce Commission and by the lower court in the proceedings giving rise to this appeal required construction and application of Sections 210a and 311 of the

Interstate Commerce Act (49 U. S. C. 310a, 911) and Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008). The full text of Sections 210a and 311 of the Interstate Commerce Act and the pertinent provision of Section 9(b) of the Administrative Procedure Act, being directly before this Court for interpretation and application, are set forth verbatim:

Section 210a—Interstate Commerce Act

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their

future usefulness in the performance of adequate and continuous service to the public.

Section 311—Interstate Commerce Act

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need, the Commission may, in its discretion and without hearings, or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

Section 9(b)—Administrative Procedure Act.

(b) Licenses. * * * In any case in which the license has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

## QUESTIONS PRESENTED

The following questions are presented by this Appeal:

*First Question:* Whether Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended, or authorized or required the Commission to extend, beyond 180 days a temporary authority issued to Pan-Atlantic Steamship Corporation under Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon expiration of the 180 days of operation allowed by the temporary authority?

*Second Question:* Whether the District Court was in error in this case by following its decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, under the doctrine of *stare decisis,* in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the appeal of that case, *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 885, 75 S. Ct. 205, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the proceedings in accordance with the stipulation of the parties as to mootness, 350 U. S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that were the matter *res integra,* they would have entered judgment for the defendant in this case?

## STATEMENT OF THE CASE

On May 6, 1955, Pan-Atlantic Steamship Corporation, (hereinafter referred to as Pan-Atlantic), filed an application with the Interstate Commerce Commission (hereinafter referred to as the Commission) under Section 309 of the Interstate Commerce Act (49 U. S. C. 909) for a permanent certificate of public convenience and necessity to transport freight and passengers as a common carrier by water between certain ports on the East and West coasts of the United States. The same day, to provide service responsive to an urgent and immediate public need, Pan-Atlantic filed with the Commission an application, under the provisions of Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) for temporary authority for a period of 180 days to render the same service covered by its application for a permanent certificate. The application for such temporary authority was granted by an order of the Commission dated May 18, 1955, with an expiration date of November 14, 1955.

On or about September 30, 1955, Pan-Atlantic made a timely application to the Commission, in accordance with applicable Agency rules which had been published by the Commission (49 C. F. R. 2.1-2.4) under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)), for a continuation of its temporary authority, until its application for permanent authority had been finally determined. On October 28, 1955, the Commission issued an order (Appendix C hereto) containing the following findings of fact: that the public need required a continuance of the service which Pan-Atlantic had been providing under its temporary authority, that the said activity of Pan-Atlantic was of a continuing nature, and that the service being

provided under the temporary authority by Pan-Atlantic was contained within the scope of the application of Pan-Atlantic for a permanent certificate. On the basis of these findings, the Commission authorized the continuance of said temporary operation until the time of final determination of the application for permanent authority.

A petition for reconsideration of said order of October 28, 1955, was filed by the same railroads that are appellees in this case, and said petition was denied by the Commission by order dated January 9, 1956. The said railroads then filed suit on March 13, 1956, to set aside the order of the Commission dated October 28, 1955, and to require it to order discontinuance of said water carrier service by Pan-Atlantic.

## THE QUESTIONS ARE SUBSTANTIAL

The paramount issue in this appeal has never been decided by this Court. The lower Court found it to be substantially the same as that raised on appeal to this Court from the decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, in which probable jurisdiction was noted by this Court (*Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 885, 99 L. Ed. 696, 75 S. Ct. 205), but which was remanded to the District Court for dismissal as moot upon request of the parties (350 U. S. 906, 100 L. Ed. (adv. p. 125), 76 S. Ct. 190).

That issue is whether the provision of Section 9(b) of the Administrative Procedure Act, which perpetuates temporary licenses issued by Federal agencies for activities of a continuing nature during the pendency of applications for renewal or new licenses covering

such activities, is applicable to temporary licenses granted under the Interstate Commerce Act.

**(a) The Decision in This Case, in Substance, Presents a Direct Conflict With the Decision of Another Three-Judge District Court Upon an Important Question of Federal Law.**

The issue of whether Section 9(b) of the Administrative Procedure Act applies to temporary licenses issued under the Interstate Commerce Act was litigated for the first time in *Stone's Express, Inc.* v. *United States, supra.* The only other time this question has been litigated has been in this case.

In both these instances, action was brought in the District of Massachusetts. One District Judge sat in both cases, but the Circuit Judge and the other District Judge were different in the two cases.

In the *Stone's Express Case, supra,* the three-judge Court concluded that Section 9(b) of the Administrative Procedure Act did not apply to temporary licenses issued under Section 210a(b) of the Interstate Commerce Act. In the present case, which arose under Section 311(a) of the Interstate Commerce Act, the three-judge Court after finding the two cases to be the same in principle, applied the rule of *stare decisis,* solely out of respect for their brethren in the same District, and adhered to the decision in the *Stone's Express Case, supra.*

However, two of the three judges in this case (one of whom was the District Judge who also sat in the *Stone's Express Case*) issued the following concurring opinion:

> Wyzanski, *District Judge:* "I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the Court

> seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass. 122 F. Supp. 995 (1954) I should conclude that, by virtue of Sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view".

If the concurring opinion by a majority of the Court—which represents the substantive opinion in this case—is considered, rather than the formal decision itself, then a direct conflict between the decisions in the *Stone's Express Case* and this case upon an important question of Federal Law is squarely presented. This Court, as a matter of course, has always taken jurisdiction of cases involving a direct conflict between decisions of Courts of Appeals involving the construction and application of Federal Statutes. Since three-judge District Courts act in a reviewing capacity from which appeal to this Court lies, the same principle is applicable to such conflicts between decisions of three-judge District Courts.

*McGrath* v. *Manufacturers Trust Co.,* 338 U. S. 241, 70 S. Ct. 4, 94 L. Ed. 31
*United States* v. *Aetna Casualty Co.,* 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171

**(b) The Decision of the District Court Imperils the Continued Existence of Several Hundred Carriers**

Section 9(b) of the Administrative Procedure Act was enacted for the dual purpose of protecting persons, conducting activities under temporary or expiring

licenses issued by Federal agencies, from suffering undue hardship, attributable to delays in the administrative procedure beyond the control of such persons, while awaiting agency decisions on their timely filed applications for new or renewal authority, and of protecting the public against a cessation of those needed services pending action by the agency on those applications.

The Interstate Commerce Commission is one of the largest Federal licensing agencies. Its docket is, and long has been, a very crowded one. Applications to obtain permanent certificates of public convenience and necessity, almost without exception, require administrative proceedings lasting more than 180 days until final determination by the Commission. This situation is precisely the type that Section 9(b) of the Administrative Procedure Act was designed to meet.

Nowhere in the Administrative Procedure Act, or in its legislative history, is there any evidence or indication that Congress intended temporary licenses issued by the Interstate Commerce Commission to be exceptions to the relief provisions of Section 9(b) of the Administrative Procedure Act. In fact, the legislative history is precisely to the contrary, as is the long-settled construction of and practice under that Section by the Commission.

Commencing in 1946, when the Administrative Procedure Act became law, the Interstate Commerce Commission proceeded with full confidence that Section 9(b) of the Administrative Procedure Act applied to temporary licenses issued by it pursuant to Section 210a and 311 of the Interstate Commerce Act. Appropriate regulations were issued by the Commission gov-

erning the operation of Section 9(b) in its application to such temporary licenses (49 C. F. R. 2.1-2.4), and annual reports to Congress were issued relating in detail the activities of the Commission pursuant thereto. (See 69*th Annual Report of the Interstate Commerce Commission,* November 1, 1955, page 93 et seq).

For example, during the five year period 1951-1955, 1972 temporary motor carrier licenses and 26 temporary water carrier licenses, which had been issued for 180 day duration pursuant to Sections 210a and 311 of the Interstate Commerce Act, were extended by the Commission in accordance with Section 9(b) of the Administrative Procedure Act, until the final determination of pending applications by those carriers for permanent authority. Until the *Stone's Express Case, supra,* in 1955, the authority of the Commission so to extend such temporary operating licenses had never been challenged. Pan-Atlantic and the other motor and water carriers involved, relying upon this settled administrative practice of the Commission, initiated operations under such temporary authorities at considerable expense, expecting that their temporary authorities would be extended, if necessary, under Section 9(b) of the Administrative Procedure Act, until their pending applications for permanent authority were finally decided by the Commission. These operations were begun in contemplation of providing uninterrupted service until the time of the final decision.

As of August 31, 1956, there were approximately 383 motor carriers and two water carriers operating under temporary licenses which had been so extended. The decision of the District Court in this case places in grave jeopardy the continued operation of these many carriers. If that decision is followed by the Commis-

sion in this and the many other cases involving the same problem, as indeed the Commission must do unless this Court rules otherwise, an immediate cessation of all services now being performed under such extended temporary licenses would necessarily result. Not only would the public suffer the loss of all those services, established in response to urgent public needs, but the expense of first suspending and then (after final decision) re-instituting them would finally terminate many such carrier services.

The principle of the decision of the three-judge District Court in the *Stone's Express Case, supra,* which threatens to produce this economic chaos in the motor carrier and water carrier industries, and which was followed, although repudiated in substance, by the three-judge District Court in this case, should be fully reviewed by this Court before its devastating effect can be brought to bear upon the many carriers inadvertently exposed to this extreme hazard.

**(c) The Questions Presented Require for Their Resolution Plenary Consideration With Briefs on the Merits and Oral Argument**

The fundamental problem presented in this case, as previously stated, is one requiring construction and reconciliation of Section 9(b) of the Administrative Procedure Act with Sections 210a and 311(a) of the Interstate Commerce Act.

Although during the first eight years of the Administrative Procedure Act the Interstate Commerce Commission had consistently applied what it believed to be the proper interpretation of those sections in more than two thousand separate instances without challenge, the three-judge District Court in the *Stone's Express Case, supra,* arrived at a different construction

of those sections, thereby completely reversing the long-settled administrative construction.

This Court recognized the significance of the problem presented by the decision of the three-judge District Court in the *Stone's Express Case, supra,* and noted probable jurisdiction (348 U. S. 885, 75 S. Ct. 205, 99 L. Ed. 969). The subsequent dismissal of that case upon stipulation by the parties as to mootness (350 U. S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125)) has left the question open.

The present case, involving the appellant Pan-Atlantic Steamship Corporation's right to continue its intercoastal steamship operation under its temporary license, while its application for permanent authority is pending, is a direct result of the decision in the *Stone's Express Case, supra.* Unless that issue is resolved by this Court, it is reasonable to anticipate similar litigation in connection with the hundreds of other carriers in a position similar to Pan-Atlantic. Under similar circumstances, where a decision of this Court will guide the disposition of a large number of comparable cases, certiorari has been granted.

*Alcoa S. S. Co.* v. *U. S.*, 338 U. S. 421, 70 S. Ct. 190, 94 L. Ed. 225
*Ludecke* v *Watkins*, 335 U S. 169, 68 S. Ct. 1429, 92 L. Ed. 1881

Moreover the issue here presented has only been considered by two three-judge District Courts, and those courts have reached opposite results on the merits of the question.

It is evident that the statutes involved are not clear and unambiguous; otherwise the court in the *Stone's Express Case, supra,* could not have reached a conclu-

sion directly contrary to the substantive conclusion reached by the District Court in this case and to the practice long applied by the agency concerned. The legislative history of the particular statutory provisions involved, and the many aspects of the long-established agency procedure under these statutes, go far toward illuminating and solving the problems here presented. It is both necessary and proper that this Court should have before it, when resolving this problem, a full presentation of all these factors, and such presentation can be accomplished only by full briefing and oral argument on these matters.

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Dated September 12, 1956.

## APPENDIX A

Opinion of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R. R. Co. et al* v. *United States et al,* Civil Action No. 56-232-W, dated May 17, 1956:

*Per Curiam.* The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp., for temporary authority under Sec. 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. Sec. 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp., to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp., to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in Sec. 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by Sec. 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.,* v. *United States,* 122 F.

Supp. 55 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in Sec. 210a(b) of the Interstate Commerce Act (49 U. S. C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States, supra*.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge*. I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States*, D. Mass., 122 F. Supp. 95 (1954), I should conclude that, by virtue of Sec. 9(b) of the Administrative procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

## APPENDIX B

Opinion of the United States District Court for the District of Massachusetts in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955, 1954:

HARTIGAN, Circuit Judge

This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321, through 2325, inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Co. Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co. Inc. St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C., made a motion for an order granting it judgment on the pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carrier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. A. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously, with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a(b) of the Interstate

Commerce Act, 49 U. S. C. A. § 310a(b), to conduct operations for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a(b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. §§ 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the December 18, 1951 and June 3, 1952 orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953 order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954 and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951 as amended by the order entered on June 3, 1952 was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period

exceeding 180 days. The plaintiff argues that under the provisions of Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 301a(b), the Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants, on the other hand, contend that by the third sentence of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1008(b), St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a(b) of the Interstate Commerce Act and of Section 9(b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9(b) does not apply to a temporary approval granted by the Commission under Section 210a(b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9(b) of the Administrative Procedure Act. Under the provisions of Section 210a(b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9(b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal

or the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license permitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9(b) and does not have the right by virtue of that statute to lease Hinsch's operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9(b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for a renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Act gives the following explanation of Section 9(b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d. Sess., entitled "Administrative Procedure Act, Legislative History 79th Congress".

Said Ohio Act referred to the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the

failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency". (Italics ours.)

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a(b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9(b) repeals Section 210a(b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351; *United States* v. *Jackson*, 1938, 302 U.S. 628, 58 S.Ct. 390, 82 L.Ed. 488; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 1882, 106 U.S. 596, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251. There must be a "positive repugnancy between the provisions of the new laws and those of the old". *Wood* v. *United States*, 1842, 16 Pet. 342, 363, 10 L.Ed. 987. We find no such repugnancy between the provisions of §§ 210a(b) and 9(b). Section 210a(b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of §§ 9(b) does not apply to the temporary ap-

proval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden Co., supra.*

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administrative Procedure Act, 5 U. S. C. A. § 1011, published its interpretation of the third sentence of Section 9(b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a(b). The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 1892, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134; *U.S.* v. *America Trucking Assn's,* 1940, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345. But, because the provisions of §§ 210a(b) and 9(b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulations." *Koshland* v. *Helvering,* 1936, 298 U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268; See *Alaska Steamship Co.* v. *U.S.,* 1933, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 532; *Social Security Board* v. *Nierotko,* 1946, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718. "* * * Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a(b), *United States* v. *Mo. Pac. R. Co.,* 1929, 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322.

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

## APPENDIX C

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 28th day of October, A.D. 1955

No. *W-376* (*Sub-No. 11*)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade

No. W-376 (Sub-No. 12)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade (2)

*It appearing,* That by order of May 18, 1955, the Commission, Division 4, granted Pan-Atlantic Steamship Corporation, temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passenger and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda Stockton and Los Angeles Harbor.

*It further appearing* That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 13) seeks a certificate of

public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub. No. 13) has been finally determined.

By the Commission, Division 4.

HAROLD D. McCOY
Secretary

(SEAL)

## APPENDIX D

Judgment of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R.R. Co. et al.* v. *United States, et al.*, Civil Action No. 56-232-W, entered May 25, 1956:

### *JUDGMENT*

This cause came on to be heard on the plaintiff's motion for leave to amend their complaint and on the motion of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of the Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby ORDERED, ADJUDGED AND DECREED:

(1) That the plaintiffs motion for leave to file their first amended complaint is granted;

(2) That the plaintiff's motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I.C.C. Docket No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in intercoastal operations beyond a period of 180 days shall be, and it is hereby vacated, annuled and set aside.

**Certificate of Service**

In compliance with Rules 13(2) and 33(1), (2) and (3-b) of the Revised Rules of the Supreme Court of the United States, I, Russell S. Bernhard, one of the attorneys for the appellant Pan-Atlantic Steamship Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as indicated below.

This, the 12th day of September, 1956.

RUSSELL S. BERNHARD.

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Copies served in duly addressed envelopes with first class postage prepaid:

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